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INTRODUCTION

Mr. Chairman, members of the Committee, thank you for asking me here today. I very much look forward to this opportunity to discuss with you how the efforts of the United States Attorney's Offices in the investigation and prosecution of terrorists have changed since the passage of the USA PATRIOT Act ("Patriot Act") and, in particular, section 218 of the Patriot Act which helped to dismantle what was formerly known as "the wall" between intelligence and law enforcement.

I will state up front that I firmly believe that the Patriot Act contained the single most important – and necessary – change in American law as it effects national security over the last decade, and that is section 218, which played a critical role in ending the artificial "wall" between intelligence and law enforcement personnel. As a prosecutor who has worked on terrorism matters for over ten years now, I thank you on behalf of federal prosecutors, FBI agents and the public for that long overdue change that has made America safer.

What was the "wall"? Before the USA PATRIOT Act, applications for FISA orders had to include a certification from a high-ranking Executive Branch official that "*the* purpose" of the surveillance or search was to gather foreign intelligence information. As interpreted by the courts and the Justice Department, this requirement meant that the "primary purpose" of the collection had to be to obtain foreign intelligence information rather than evidence of a crime. Over the years, the prevailing interpretation and implementation of the "primary purpose" standard had the effect of limiting coordination and information sharing between intelligence and law enforcement personnel. Because the courts evaluated the government's purpose for using FISA at least in part by examining the nature and extent of such coordination, the more coordination that occurred, the more likely courts would find that law enforcement, rather than foreign intelligence collection, had become the primary purpose of the surveillance or search. The perceived need for a wall was based on the assumption that information about persons and groups seeking to do harm to our country could neatly be separated into "intelligence" information and "evidence."

It is nearly impossible to comprehend the bizarre and dangerous implications that "the wall" caused without reviewing a few examples. While most of the investigations conducted when the wall was in place remain secret, a few matters have become public. For instance, I was on a prosecution team in New York that began a criminal investigation of Usama Bin Laden in early 1996. The team – prosecutors and FBI agents assigned to the criminal case – had access to a number of sources. We could talk to citizens. We could talk to local police officers. We could talk to the CIA. We could talk to foreign police officers, foreign citizens, even foreign spies. And we did all those things as often as we could. We could even talk to al Qaeda members – and we did. We actually called several members and associates of al Qaeda to testify before a grand

jury in New York. And we even debriefed al Qaeda members overseas who agreed to become cooperating witnesses.

But there was one group of people we understood we could not talk to. Who? The FBI agents assigned to a parallel intelligence investigation of Usama Bin Laden and al Qaeda. We understood that we could not learn what information they had gathered from FISA surveillances without prior approvals of other officials. That was "the wall," which a federal court has since agreed was fundamentally flawed – and dangerous.

Let me review some other examples of how the wall played out. On August 7, 1998, al Qaeda struck at the American embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, nearly simultaneously, killing 224 people. The team of FBI agents and prosecutors, which had obtained a sealed indictment of Bin Laden two months earlier, deployed to East Africa and almost immediately learned of al Qaeda's involvement and arrested two bombers in Nairobi. One month later, in September 1998, a man named Ali Mohamed was questioned before a federal grand jury in Manhattan. Ali Mohamed, a California resident, had become a United States citizen in 1989 after serving in the United States Army beginning in 1986. It was believed at the time that Mohamed lied in the grand jury proceeding and that he was involved with the al Qaeda network, but Mohamed had not by then been tied to the bombings. Ali Mohamed left the courthouse to go to his hotel, followed by FBI agents, but not under arrest. He had imminent plans to fly to Egypt. The decision had to be made at that moment whether to charge Mohamed with false statements. If not, Mohamed would leave the country. That difficult decision was made without knowing or reviewing the intelligence information on the other side of the "wall." It was ultimately decided to arrest Mohamed that night in his hotel room. As described below, the team got lucky, but we

never should have had to rely on luck. The prosecution team later obtained access to the intelligence information, including documents obtained from an earlier search of Mohamed's home by the intelligence team on the other side of "the wall." (The search had been a FISA search under authority that pre-existed the Patriot Act.) Those documents included direct written communications with al Qaeda members and a library of al Qaeda training materials that would have made the decision far less difficult. The criminal case gathered additional evidence through further investigation. Mohamed later pleaded guilty in federal court admitting that he was a top trainer to the leadership of al Qaeda and Egyptian Islamic Jihad, and that he had participated in the surveillance of a number of overseas American targets, including the American embassy in Nairobi, Kenya, and had later shown the sketches of that embassy to Bin Laden himself. Mohamed further admitted he had trained some of the persons in New York who had been responsible for the 1993 World Trade Center bombing. Mohamed stated that had he not been arrested on that day in September 1998, he had intended to travel to Afghanistan to rejoin Usama Bin Laden. Thus, while the right decision to arrest was made partly in the dark, the "wall" could easily have caused a different decision that September evening that would have allowed a key player in the al Qaeda network to escape justice for the embassy bombing in Kenya and rejoin Usama Bin Laden in a cave in Afghanistan, instead of going to federal prison.

What is ironic is that this is an example of where the wall came into play where both criminal and intelligence investigations existed. In most cases, the wall prevented criminal cases from being opened or pursued at all. In 1993, for example, after the World Trade Center bombing, conspirators, including Sheik Omar Abdel Rahman, planned to bomb the Holland and Lincoln tunnels, the FBI building, the United Nations and the George Washington Bridge.

Prosecutors, however, were in the dark about the details of the plot until very late in the day for fear that earlier prosecutorial involvement – even mere knowledge by the prosecutors of what was happening – would breach the wall. Later, during the investigation of the planned Millenium attacks, criminal prosecutors were forced to observe the wall while the intelligence community dealt with al Qaeda planned attacks on our soil and overseas. Criminal prosecutors received information only in part and with lag time so as not to breach the wall. The persons who determined what could be shared with the prosecutors were on the other side of the wall, making their best guess as to what would be helpful. This was no way to defend our country from imminent attack. Moreover, the above examples occurred in New York where the working relationship between prosecutors and agents in the field was strong. In many other areas in the country, the wall was so high that criminal agents and prosecutors simply had no idea what intelligence investigators were doing, and often even who they were.

When I heard over the last several years from critics of the Patriot Act that the law was passed in haste and ought simply be repealed, I think back to the days when prosecutors and agents made decisions about national security – life and death decisions – while only looking at half the cards in their hand and know that the change came a decade too late, not a moment too soon.

Prior to the Patriot Act, there was also concern with a prosecutor's uncertain ability to share grand jury testimony affecting national security with the intelligence community, a problem that was fixed by section 203(a) of the Patriot Act. In 1997, Wadih el Hage, a key member of the al Qaeda cell in Nairobi, Kenya, had his Nairobi residence searched and his telephone wiretapped with the participation of the intelligence community. He thereafter departed Kenya en route to

Dallas, Texas, in September 1997, changing flights in New York City. At that point, el Hage was subpoenaed from the airport to a federal grand jury in Manhattan where he was questioned about Bin Laden, al Qaeda and his associates in Kenya, including among others his close associate "Harun." El Hage chose to lie repeatedly to the grand jury, but even in his lies he provided some information of potential use to the intelligence community – including potential leads as to the location of his confederate Harun and the location of Harun's files in Kenya. Unfortunately, as el Hage left the grand jury room, we knew that we could not then prove el Hage's lies in court. And we also knew that the law did not clearly provide for sharing grand jury information with the intelligence community. We did not want, however, to withhold information of intelligence value. Fortunately, we found a way to address the problem that in most other cases would not work. Upon request, el Hage voluntarily agreed to be debriefed by an FBI agent outside of the grand jury when it was explained that the FBI agent was not allowed in the grand jury but was also interested in what el Hage wanted to say. El Hage then repeated the essence of what he told the grand jury to the FBI agent, including his purported leads on the location of Harun and his files. The FBI then lawfully shared that information with others in the intelligence community. In essence, we solved the problem only by obtaining the consent of a since convicted terrorist. We should not have to rely on the generosity of al Qaeda terrorists to address the gaps in our national security.

As I mentioned earlier, the American Embassy in Nairobi, Kenya, was bombed in August 1998. Investigation in Kenya quickly determined that Harun (described above) was responsible for the bombing. (Harun had left Kenya in 1997 after the search of el Hage's Nairobi home, correctly fearing that American officials were looking for him. Harun returned in 1998 to

carry out the bombing.) Harun's missing files were uncovered in the investigation of the bombing, stored at a charity office in Nairobi. (Harun remains a fugitive today and an important al Qaeda operative.) The point here is that had el Hage provided truthful information about the al Qaeda cell in Kenya a year before the embassy attacks, the rules then in existence did not provide for the sharing of that grand jury material had the team not used the FBI interview to work around the problem. This example should not be written off as "no harm, no foul": we should not have to wait for people to die with no other explanation than the law blocked the sharing of specific information that provably would have saved those lives before acting. The Patriot Act addressed that problem of separating the dots from those charged with connecting them.

These concrete examples demonstrate that the need to tear down the wall between criminal and intelligence investigations was real and compelling and not abstract. Section 218 did this by eliminating the "primary purpose" requirement discussed above. Under section 218, the government may now conduct FISA surveillance or searches if the gathering of foreign intelligence is a "significant" purpose of the surveillance or search, thus eliminating the need for courts to compare the relative weight of the "intelligence" and "law enforcement purposes" of the surveillance or search. This means that law enforcement and intelligence personnel can now share information without worrying that by doing so they will be jeopardizing the government's ability to continue ongoing FISA surveillance or introduce evidence in court. It is important to point out, however, that section 218 did nothing to alter the requirement that the Foreign Intelligence Surveillance Court may only authorize surveillance or searches under FISA when it finds that there is probable cause to believe that the target is a foreign power or an agent of a foreign

power, such as a terrorist or spy, and that section 218 was found to be constitutional in a unanimous decision of the FISA Court of Review in 2002.

I can tell you from personal experience that section 218 has made a huge difference in the way we approach national security. Today, as United States Attorney in Chicago, the prosecutors in my office enjoy a good working relationship with the FBI agents in Chicago. We are aware of the intelligence investigations they do and they are aware of our criminal cases and we coordinate to make sure that the law is followed and that all information is shared appropriately. In simple terms, we are making sure that if people who pose a threat to our country *can* be arrested, my office knows about it. Then together with the FBI we decide what, if any, national security sources and methods would be exposed by a prosecution and make an informed decision whether it is in the interest of our country's national security to proceed. It sounds simple and logical. It is. But it was not that way before the Patriot Act.

Let me give you a concrete example. In 2003, FBI agents had for several years been conducting an intelligence investigation regarding Khaled Dumeisi's activities on behalf of the Government of Iraq. Dumeisi had been living in the Chicago area and publishing a newspaper. However, Dumeisi had been gathering information (including telephone records) on Iraqi opposition figures in the Chicago area and transmitting the information to the Iraqi Intelligence Service. Dumeisi also provided Iraqi spies with false press credentials and recorded conversations with Iraqi opposition figures through the use of hidden microphones. In the past, such an espionage investigation would be conducted with little interaction with prosecutors. However, because of the ability in 2003 to share information which had both intelligence value and constituted evidence of a federal crime without compromising the ability to conduct FISA

surveillance, the intelligence agents worked together with prosecutors in my office to assemble a case against Dumeisi for serving as an unregistered agent of a foreign power, as well as for perjury. Dumeisi was convicted after trial in January 2004, and sentenced to 46 months in prison.

The Dumeisi case is far from unique. Efforts to increase coordination and information sharing between intelligence and law enforcement officers have been undertaken nationwide.

CLOSING

Mr. Chairman, I thank you for inviting me here and giving me the opportunity to explain in concrete terms how the Patriot Act has changed the way we fight terrorism. I would like to thank this Committee for its continued leadership and support. I also wish to assure this Committee that the men and women of the Northern District of Illinois, and the U.S. Attorney's Offices elsewhere in the country, appreciate the Constitution and the values it represents as we go about out work. With your support we will continue to make great strides in keeping both our country and our Constitution safe.

I will be happy to respond to any questions you may have.